Supreme Court, U. S.
FILED
JUL 10 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-62

RUSSELL L. RUNYON
AND
KATHERYNE E. RUNYON
Petitioners

v.

MICHAEL L. McCRARY, ETC.
AND
COLIN GONZALES, ETC.
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

LOUIS KOUTOULAKOS, ESQ.
2054 14th Street, North
Arlington, Va. 22201
For Petitioners

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

	Page
Opinion Below	2
Jurisdiction	2
Questions Presented	2
Statute Involved	2
Statement of Facts	3
Reasons for Granting the Writ	5
Legal Argument	6
Conclusion	13
Appendix	1a

TABLE OF CITATIONS

Cases:

Burton v. Wilmington Parking Authority, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed. (2d) 45 (1951)	10
Civil Rights Cases, 3 S.Ct. 18, 109 U.S. 3 (1883)	7
Corrigan v. Buckley, 271 U.S. 323, 46 S.Ct. 521, 70 L.Ed. 969	9
Hampton v. Thompson (C.A. Tex. 1949), 171 F.(2d) 535	12
Hurd v. Hodge, 334 U.S. 24, 68 S.Ct. 847, 92 L.Ed. 1187	9
Jones v. Alfred Mayer & Co., 392 U.S. 409, 88 S.Ct. 2186 (1968)	8
Martinsen v. Mullaney, 85 F. Supp. 76, 12 Alaska, 455 (1949)	7
McDonald v Shawnee Country Club Inc., 438 F.(2d) (632)	9

	Page
Moose Lodge v. Irvis, 407 U.S. 173, 92 S.Ct. 1965 (1972)	9, 10
Norwood v. Harrison, 93 S.Ct. 2804 (1973)	10
Pierce v. Society of Sisters, et al., 268 U.S. 510, 45 S.Ct. 571 (1925)	9
Riley v. Adirondack School for Girls, 368 F. Supp. 392 (1972)	10
Robeson v. Finelli, D.C.N.Y. 1950, 94 F. Supp. 62	12
Shelly v. Kramer, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed 1161 (1948)	10
Sims v. Order of Commercial Travelers, 433 F. Supp. 102 (D. Mass. 1972)	9
Tillman v. Wheaton Haven Recreation Association, 410 U.S. 431	10
U.S. v. Cruickshank, 25 Fed. Case No. 14,897, *Affirmed*, 92 U.S. 542, 2 Otto 542, 25 L.Ed. 588	7
Va. v. Rives, 100 U.S. 313	7
Waters v. Pachen Contractors Inc. (D.C., Ill., 1966, 227 F. Supp. 659)	7
Wesley v. City of Savannah, 294 F. Supp. 698	9
Wisconsin v. Yoder, 92 S.Ct. 1526 (1972)	10

MISCELLANEOUS:

42 U.S.C.A. § 1981	2, 6, 7, 8, 11, 13
Cong. Globe, 39th Cong., 1st Sess. 409 (1866)	6
Gressman, CIVIL RIGHTS LEGISLATION, at p. 1329	7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No.

RUSSELL L. RUNYON

AND

KATHERYNE E. RUNYON

Petitioners

v.

MICHAEL L. McCRARY, ETC.

AND

COLIN GONZALES, ETC.

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner prays for a writ of Certiorari to issue to review the judgment of the United States Court of Appeals for the Fourth Circuit affirming a judgment of the United States District Court for the Eastern District of Virginia.

OPINION BELOW

The United States Court of Appeals for the Fourth Circuit affirmed, in a 4 to 3 decision, the judgment of the United States District Court for the Eastern District of Virginia, on April 15, 1975. Rehearing by Plaintiff Appellant, and by intervenor denied May 29, 1975.

JURISDICTION

Jurisdiction is invoked under Title 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

1. Whether Or Not 42 U.S.C.A. §1981 Reaches Purely Private Conduct, and Can Private Schools Free of Any State Action, Set Their Own Standards as to Who They Will Admit.
2. The Unconstitutional Application and Interpretation of 42 U.S.C.A. §1981, By the Lower Court, Whereby it Limits its Application to Only White Schools.
3. The First Amendment of the United States Constitution Guarantees and Protects the Right to a Free Choice of Association, Privacy, and Expression to All its Citizens.

STATUTE INVOLVED

42 U.S.C.A. §1981: (Appendix Exhibit A)

> "All persons within the jurisdiction of the United States shall have the same right in every state and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind and to no other."

STATEMENT OF FACTS

The following is a succinct review of the material facts involved:

A joint action for damages was brought against Petitioners Russell L. Runyon and Katheryne E. Runyon d/b/a Bobbe's School, by Michael McCrary, an infant, by his parents, and Colin M. Gonzales, an infant, by his parents, pursuant to 42 U.S.C. §1981 and 42 U.S.C. §2000a, to secure for the plaintiffs, now respondents, who are black, the alleged right to contract, as enjoyed by whites, and to enjoyment of places of public accommodation without discrimination, based on race or color.

The respondents, at the trial level, waived and dismissed any claims under any civil rights act except 42 U.S.C. §1981. They further stipulated that the petitioners were a private school, not supported by any local, state or federal assistance, thus no state involvement, and relying solely on funds derived from tuition paid by its students to support it. (see p. 181 J.T.)

A similar suit was filed against Fairfax-Brewster School, Inc., which was consolidated for trial.

The Southern Independent School Association intervened, by agreement and with court permission.

The Respondent and Petitioners, Bobbe's School, introduced evidence in their behalf. Regarding Bobbe's School, the Gonzales testimony, in substance was that upon their son being rejected by Brewster School after application, called the Bobbe's School inquired about its integration policy, and upon being told by someone that the school was not integrated, did nothing further. [This was in 1969, suit brought in

1972.] Mr. Gonzales further testified that he was advised of the admission policies of the school, that an application would have to be filled out, a registration fee paid, a need for a doctor's certificate and a personal interview. Also that the "race" of an applicant was not requested on any of the forms. ((See p. 107 of J.T.) Mr. Gonzales never complied in any way, although he admitted receiving the forms. (p. 109 J.T.)) He further testified he did not identify himself nor did he say he was black. (pp. 123-124 Tr.) He said he was only concerned with Brewster School, he never told young Colin about Bobbe's School, or about the call to the Bobbe's School. (pp. 103, 108 J.T.) That the youngster enrolled at Congressional, a private school, lost no time from school, then entered Catholic school, and later a public school. He conceded his son was well adjusted and did well in school. (Mrs. Gonzales's testimony was substantially the same.) see pp. 82-83 J.T.

Mrs. McCrary testified, in material substance, that in 1972 she called the Bobbe's School, inquired about its admission and integration policy and on being told, allegedly, that the school did not accept "blacks", did nothing further. Although advised about the requirement for formal application, did not make any formal application. That she had only the one contact, by phone, with the school. Never told her son about this. (pp. 126, 127 J.T.) Her husband's testimony was essentially the same, but he did not call the school at any time, and he never said anything to his son, about the call and the conversation.

Mr. Gates testified that he was superintendent of Bobbe's School, that it was a development for preschool education, and for the first and second grades.

That he was superintendent in 1969. That he could not recall any calls from Mr. Gonzales, that the school policy did not exclude children purely on basis of race. [(pp. 183-184 J.T. Tr.)] Did not recall any call from McCrary. That the school was integrated, that children of other races attended. That no black child had ever applied. That the school policy was to require formal application for everyone, regardless of race. That any child, regardless of race, would be treatd alike, considered on the same basis. That the school was selective of its students, regardless of race (pp. 185-187 J.T.) That the school policy was that no one was accepted on the basis of any phone call, regardless of race. (p. 187 J.T.)

It was stipulated that Mrs. Runyon, the founder of the school, would corroborate Mr. Gates' testimony. (pp. 188-189 J.T.)

The district court, at the conclusion of the evidence and argument by counsel, rendered a memorandum opinion and judgment order, a copy of which is attached hereto as Exhibit B.

On appeal the judgment was affirmed in part by a divided court, with a 4-3 split as to the main issue of the case. A copy of said opinion is attached here as Exhibit C. The constitutionality of an act of congress is being questioned, therefore 28 U.S.C. §2403 may be applicable.

REASONS FOR GRANTING THE WRIT

1. The issues involve substantial constitutional issues of extreme public importance. They deal with the private rights of citizens guaranteed to them by the Constitution.

2. The issue involved is one of first impression, by any federal court, at any level, involving the constitutionality of 42 U.S.C.A. §1981, and its applicability to purely private conduct.

3. The constitutionally protected right, under the First Amendment, guaranteeing to all citizens the right of privacy, freedom of speech, and association, protects parents and private schools in their private conduct.

LEGAL ARGUMENT

42 U.S.C.A. § 1981 Is Not Applicable To Private Acts of Discrimination

The determination by the trial court and by the majority, 4-3 of the court of appeals, that §1981 reached purely private conduct is clearly erroneous and constitutionally unsound.

It would seem proper, at this time, to briefly summarize the history and background of §1981. This section was conceived during the Reconstruction Era by legislation involving the Civil Rights Act of 1866 and 1870 as well as the 13th, 14th, and 15th Amendments.

The 13th Amendment was passed abolishing slavery and involuntary servitude. Thereafter the Civil Rights Acts of 1866 were passed. The clear and only purpose of the 13th Amendment was to abolish all forms of involuntary servitude. This is confirmed by the Congressional Record of the debates, alluding to the fact that the 13th Amendment was to be no wider than to cover the relation existing between master and slave and could extend no further (Cong. Globe, 39th Cong., 1st Sess. 409 [1866].) The Civil Rights Act of 1866 became law despite a presidential veto. The 14th Amendment came into being because of the great con-

cern about the vitality and legality of the 13th Amendment and the Civil Rights Act. As a matter of fact the provisions of the 1866 Act were meant to be incorporated into the 14th Amendment. (Gressman, Civil Rights Legislation, at p. 1329.) Thus the equal rights amendment was born and given shape in the form of the 14th Amendment. To further reinforce the argument as to the concern over the 13th Amendment and the Civil Rights Act of 1866, the Civil Rights Act of 1870 was passed, re-enacting the Civil Rights measure, after passage of the 14th Amendment, to provide constitutional support.

That the 14th Amendment did not and could not reach private discriminatory acts was clearly decided by this honorable court, in its decision in the Civil Rights cases (109 U.S. 3[1883]). The Honorable Justice Bradley *concluded that individual invasion of individual rights is not constitutionally prohibited and was not, and could not be the subject matter of the Amendment* (id at p. 11). The object of this section (42 U.S.C.A. §1981) was to protect civil rights against state infringement, having reference to the 14th Amendment as its bedrock (see *Va.* v. *Rives,* 100 U.S. 313). And this subchapter could not be given any broader scope than the 14th Amendment on which it was based. (*Martinsen* v. *Mullaney,* 85 F.Supp. 76, 12 Alaska 455 [1949].) The Civil Rights Act of 1866 was passed to shield Negroes from hostile legislation by the states. (*U.S.* v. *Cruickshank,* 25 Fed. Case No. 14,897, *aff'd.* 92 U.S. 542, 2 Otto 542, 25 L.Ed. 588.) And 42 U.S.C.A. §1981, the modern version of the Civil Rights Act, equally only applies to acts done under color of state law. (*Waters* v. *Pachen Contractors Inc.* [D.C. Ill., 1966, 227 F.Supp. 659].)

In passing the Civil Rights Act of 1964 (that is 42 U.S.C.A. §1981) certainly Congress was aware of the Civil Rights Acts of 1866 and 1870, and also of the decisions in the Civil Rights cases decided in 1883, and the interpretations contained in the opinion of the court. It was clear that the U.S. Supreme Court determined that private conduct, that is private acts of discrimination, were not prohibited by the Constitution, and therefore the Civil Rights Acts were not applicable to private conduct.

Certainly, with this knowledge, had Congress intended that 42 U.S.C.A. §1981 reach private conduct, it would have said so. However, it did not and could not intend to restrict purely private acts (albeit admission policies to private or independent schools). Even if it wanted to, such a provision could not pass constitutional muster.

The application of §1981 to private acts, by the courts, is of a very limited nature, and of recent vintage. It has never before been decided that it applies to purely private schools. (It may be further pointed out that there is a marked split of opinion in its application, even in the limited area of decision.)

In *Jones* v. *Alfred Mayer & Co.*, (392 U.S. 409, 88 S. Ct. 2186, [1968]) this court held §1982 applicable to certain private discriminatory acts and by way of dicta alluded to §1981 as being cut from the same mold, and, thus has been subsequently interpreted by some courts as applicable to some private acts. [Even here, there is a decided split among the courts regarding this application, with cases on both sides of the issue.]

It should be pointed out that Jones *did not* involve §1981 and dealt with real estate on the public market.

The dissent in "Jones" clearly focusses on the rationale of §1982 and puts it in proper perspective. There the Honorable Justices Harlan and White seriously question the majority opinion, and the construction of §1982.

At 88 S.Ct. pp. 2208 et seq., Mr. Justice Harlan traces the civil rights legislation and points up the legislative history and court decisions as prohibiting "state" action as opposed to private action.

See: (*Corrigan* v. *Buckley,* 271 U.S. 323, 46 S.Ct. 521, 70 L.Ed. 969), (*Hurd* v. *Hodge,* 334 U.S. 24, 68 S.Ct. 847, 92 L.Ed. 1187)

See also: (*Moose Lodge* v. *Irvis,* 407 U.S. 173, 92 S. Ct. 1965 [1972]), (*McDonald* v. *Shawnee Country Club Inc.,* 438 F.(2d) (632), (*Wesley* v. *City of Savannah,* 294 F.Supp. 698), (*Sims* v. *Order of Commercial Travelers,* 433 F.Supp. 102 [D. Mass. 1972]).

The Right of Parents and of Private Schools To Freedom of Choice As To Admission Policies and Private School Selection Is Protected by the First Amendment of the Constitution.

The right to a public education is certainly clothed with state action and public interest. Therefore there could not and should not be any discriminatory policies of any type under any guise. However, there is no civil right nor constitutional right to a private education. It is inescapable that the task of educating is a 1st Amendment right of parents, as a freedom of choice and freedom of association and expression, protected by the Constitution. (*Pierce* v. *Society of Sisters,* et al, 268 U.S. 510, 45 S.Ct. 571 [1925]). This case cuts through the argument of public responsibility and

police power, and resolves the question of parental rights protected by the 1st Amendment in declaring a state compulsory education act as violative of the 14th Amendment. See also *Wisconsin* v. *Yoder,* (92 S.Ct. 1526, [1972]).

In *Moose Lodge No. 107* v. *Irvis, supra,* this Honorable Court specifically held that the equal protection clause prohibits discriminatory action by the state, but *"erects no shield" against private conduct,* however discriminatory or wrongful. (See also *Shelley* v. *Kramer,* 334 U.S. 1, 68 S.Ct. 836, 92 L. Ed. 1161 [1948], *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed. (2d) 45 [1951].)

The case of *Tillman* v. *Wheaton Haven Recreation Association* 410 U.S. 431, did not involve a private club and was limited in its scope to just that and no more. As a matter of fact the court pointed out it was *not* deciding the issue of a private club.

And in *Norwood* v. *Harrison* (93 S.Ct. 2804 [1973]), the court in striking down a state law, in essence said that private schools have a right to exist and operate, *and absent state involvement a purely private school can have discriminatory policies* and not be in violation of the Constitution.

See also *Riley* v. *Adirondack School for Girls* (368 F.Supp. 392, [1972]).

The Constitution was never meant to be a vehicle by which to deprive people of individual rights, freedom to choose and freedom of association. It could never be the intention of Congress or any other body, politic, judicial, or otherwise, to eliminate private schools. Every one has a right to a public education, should they so desire. The effect of the court's ruling is to destroy

the private school system, and creates for all practical purposes a *de facto* public school system. The argument that this is a constitutional protected contractual right does not come to grips with the real issue that each citizen in his or its private conduct has a freedom of choice protected by the Constitution. And this private conduct even includes the right to discriminate, if it so desires, absent state action.

"Equality" cuts both ways, and eliminating the philosophical and emotional approach, these individual rights go to the very core of our democracy. Destroy them and you undercut the basic vitality and fibre of a free society.

42 U.S.C.A. § 1981 as Interpreted by the Court, is Unconstitutional, Class Legislation, and/or Unconstitutionally Applied. It is Beyond the Power of Congress to Legislate Against Purely Private Conduct.

The Constitution cannot be an instrument for special or class legislation, but must be interpreted to apply equally to all.

The district court, in its opinion decided that §1981 only restricts "whites" and has no application to any other race. (See footnote of district court's opinion [363 F.Supp. 1200, at p. 1204].) As the dissent ably points out (see U.S.C.A. 4th Circuit—*McCrary, et als* v. *Runyon, et als,* No. 73-2348) at p. 33 that this certainly is an unconstitutional application of the statute, assuming the statute is constitutional.

Constitutional amendments and federal statutes dealing with race or color have been interpreted and applied not to discriminate in favor of Negroes but to prevent discrimination against them, not to make but to prevent

a different rule for Negroes than for whites. (*Hampton* v. *Thompson,* [C.A. Tex. 1949], 171 F.(2d) 535.)

Certainly, no court can ever force a person to enter into a contract against his will, and that is what we are concerned with here. The law has always required a meeting of the minds, that is an offer and acceptance, mutually, not unilaterally.

In the Civil Rights cases (3 S.Ct. 18,109 U.S. 3, 27 L.Ed. 836, [1883]) this court specifically held that Congress *did not* have the power to legislate on subjects that are within the domain of state legislation but to provide relief against state action or legislation. And as to contracts it held specifically that Congress *did not* have the power to provide laws for the general enforcement of contracts. The court further pointed out that class legislation is prohibited and absent any state involvement, the power of Congress is curtailed. The Congress has no constitutional power to restrict purely individual and private conduct, nor can it protect so-called civil liberties absent state action. (*Robeson* v. *Finelli,* D.C.N.Y. 1950, 94 F.Supp. 62.)

The Honorable Justice Harlan, in his dissent, joined by Honorable Justice White, in the *Jones* case, alludes to the question here raised, regarding this constitutional infirmity. (See 88 S.Ct. pp. 2208-9.)

The 14th Amendment requires state action. The 13th Amendment only dealt with abolition of slavery. Certainly the finding of the court, compelling private individuals to enter into a contract against their will, would seem to reverse history, and in effect compel "whites" into a contract, thus tantamount to making "slaves" of them, since they now have no freedom of choice.

CONCLUSION

A serious and important question of great public concern is involved. The constitutionality of 42 U.S. C.A. §1981 is in serious doubt, the freedom of choice of association by individuals and the very existence of the private schools is in issue.

The issue is one of first impression and great constitutional significance. A Writ should be granted.

Respectfully submitted,

LOUIS KOUTOULAKOS, ESQ.
2054 14th Street North
Arlington, Va. 22201
For Petitioner Bobbe's School

APPENDIX

EXHIBIT A

SUBCHAPTER I.—GENERALLY

§ 1981. Equal rights under the law

All persons within the jurisdiction of the United States have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

R.S. § 1977

Historical Note

Derivation. Act May 31, 1870, c. 114. § 16, 16 Stat. 144.

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

CIVIL ACTION No. 494-72-A

COLIN M. GONZALES, *et al.*,

Plaintiffs,

v.

FAIRFAX-BREWSTER SCHOOL, INC.,

Defendant,

and

CIVIL ACTION No. 495-72-A

MICHAEL C. MCCRARY, *et al.*,

Plaintiffs,

v.

RUSSELL L. RUNYON, *et al.*,

Defendants,

and

SOUTHERN INDEPENDENT SCHOOL ASSOCIATION,

Intervenor-Defendant.

Memoradum Opinion and Order

(Filed July 27, 1972)

On May 17, 1954, the Supreme Court decided *Brown* v. *Board of Education*, 347 U.S. 483 (1954) The same year Fairfax-Brewster School was founded. It commenced operations in 1955. In 1958 Bobbe's Private School commenced operations. Neither school receives any assistance, financial or otherwise, from any state, local or federal agency; and each relies entirely on funds derived from tuition paid by students to support its operations. In 1956 Fairfax-Brewster commenced operation of a summer day camp and in 1967 Bobbe's did the same thing.

The enrollment at Fairfax-Brewster School grew from an average of 21 in the first year, 1955-56, to 223 in the year 1972-73. The rise in enrollment has generally been increasing except for the year 1969-70 when it dropped to 177 from the previous year's 208. The day camp's enrollment records are not available prior to 1962, but it shows a growth from 21 that year to 236 in the summer of 1972. An unusually large increase was shown in 1969 over the previous year, but this dropped back in 1970.

Bobbe's School grew from 5 in 1958 to an average of 200 in the years 1966-72. The day camp has averaged 100 students per year since its commencement. Neither school has ever had a black enrolled at either its day camp or school. Both schools require submision of an application form, a medical certificate as to the child's health, and a personal interview with the parties.

In early May of 1969, in response to an advertisement appearing in the "yellow pages" of the telephone directory similar to Pltf's Ex. 3, the parents of Colin M. Gonzales, both of whom are black, as is Colin, telephoned and then visited the school where they were shown around. Being pleased with what they saw, they completed, on forms furnished them by the school, an application for the day camp and later a medical certificate prepared by a doctor. They subsequently submitted these to the school with a check for either $15 or $20. On May 16, 1969, Mr. and Mrs. Gonzales received the medical certificate and check in the mail with a form letter from Fairfax-Brewster (Pltf's Ex. 2) stating that the school was "unable to accommodate the application." No reason was given. Upon receipt of the letter Mr. Gonzales called the school, spoke to a person who identified himself as Captain Reiss,[1] and, in response to his inquiry as to why his son's application

[1] Capt. Stuart A. Reiss is the Chairman of the Board while his son, Robert S. Reiss, is the Administrative Director, and his daughter-in-law, Olga M. Reiss, the registrar.

was rejected, was told "we are not integrated." Both Robert S. Reiss and Stuart Reiss denied any such conversation. They then stated that Colin, whom they believed was primarily interested in entering the first grade, was rejected, not on the basis of his race, but because his application lacked supporting data as to his previous schooling. Moreover, knowing that Colin had previously attended Crossroads Day Nursey, they claimed he would not qualify for the first grade. Consequently, since eligibility for the day camp was contingent on one's being qualified for the first grade, they felt it would be unfair to allow Colin to enter the day camp and then have to be withdrawn before the commencement of the academic year. In conclusion, the three Reisses all denied that it was the school or day camp's policy to exclude an applicant because of his race. The Court rejects this testimony as unbelievable and finds that the reason for the rejection was because Colin was black.

Subsequent to his son's rejection by Fairfax-Brewster, Mr. Gonzales telephoned Bobbe's School where, in answer to an inquiry as to whether it was integrated, he was told that only members of the Caucasian race were accepted. He filed no formal application with Bobbe's School.

Application was ultimately made for Colin at Congressional School, a non-public school, where he was accepted and did well.

In August, 1972, in response to an advertisement in the "yellow pages" of the telephone directory, Mrs. Sandra McCrary, who is black, called Bobbe's Private School to enroll her 2 year old son, Michael, in nursery school. After first inquiring as to the price, policies, meals, transportation and facilities for "toilet training," she asked if the school was integrated. Upon receiving a negative reply, she asked if the school accepted black children. The answer to this question was also "no." She filed no formal application with Bobbe's.

Bobbe's denied receiving telephone calls from either Mr. Gonzales or Mrs. McCrary; stated that it was not the policy of the school to exclude anyone because of race; denied that the school has ever told anyone that the school was not integrated; and stated that no one can be considered without a personal interview with the applicant and his parents or without a formal application being submitted with an accompanying medical certificate. Bobbe's introduced further testimony that no black child had ever applied for enrollment.

The Court finds that the calls were made to Bobbe's and that both Colin Gonzales and Michael McCrary were denied admission because they were black. It is of no moment that no formal application was filed. It would be ridiculous to require this of the plaintiffs after they had effectively been told its was useless.

The policy of the schools with regard to exclusion of blacks was corroborated by Mrs. Bryant and Mr. Brooks. The former testified that in 1972 she telephoned Fairfax-Brewster and Bobbe's School to inquire about their admission policies. She testified that both schools told her they were not integrated and would not accept blacks. Mr. Brooks, a deputy Equal Employment Opportunity Commission officer with the Navy and Mrs. McCrary's supervisor, testified that after he became aware of the McCrary's allegations as raised in this suit against Bobbe's he decided to call for himself. He stated that during his telephone conversation of May 31, 1973, with a Mr. Gates at Bobbe's, he asked whether the school was accredited and if it was integrated. Upon receiving a negative response to the latter question Brooks further asked if blacks were admitted. Again he was told "no."

Colin Gonzales has filed an action against Fairfax-Brewster. Mr. and Mrs. McCrary, Michael McCrary, and Coline Gonzales have filed an action against Bobbe's. The

sole basis for the actions is 42 U.S.C. § 1981.[2] The Southern Independent School Association intervened as a party-defendant in the action against Bobbe's asserting that it represents "non-profit, private white schools in seven states and the class of all similarly situated schools and their associated students and parents."

The intervenor takes a different tack from that of the principal defendants. It concedes that race is a factor in its policies of exclusiveness, but says that 42 U.S.C. § 1981 cannot be used to compel admission of a black child to a white school of the type it represents, and prays an adjudication to that effect.

The actions were consolidated and tried on July 16 and 17, 1973.

No determination was made prior to trial that the actions might be maintained as a class action, either as asserted by the plaintiff or the intervenor; and the Court does not feel it should be so maintained. Accordingly the decision is only binding on the named plaintiffs, the named defendants, and those schools which actually comprise the intervenor.

42 U.S.C. § 1981 reads as follows:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

If read literally the act covers these plaintiffs, who have been denied their right to make a contract with the defend-

[2] Originally 42 U.S.C. § 2000a was alleged as a basis for the actions. This was withdrawn prior to trial.

ants because they are not white. That is to be read literally is no longer open to question. In considering 42 U.S.C. § 1982, the Supreme Court has said that ". . . Congress meant exactly what it said." *Jones* v. *Mayer Co.*, 392 U.S. 409, 422 (1968). Interrelated as § 1981 and § 1982 are, there is no reason to think Congress meant any less when it enacted § 1981. *Tillman* v. *Wheaton-Haven Recreation Ass'n.*, 41 U.S.L.W. 4311 (February 27, 1973). The purpose of both is to prohibit all racial discrimination against non-whites,[3] whether that infringement be "by 'State or local law,'" or "by 'custom, or prejudice.'" *Jones* v. *Mayer Co., supra.* at 423. In other words, no state action is necessary to invoke § 1981.

Although both schools claim to have strictly established criteria for enrollment, the end result of their admission policies as applied to both Colin and Michael evidences no "plan or purpose of exclusiveness" for selection of students "*other than race.*" (Emphasis added.) *Sullivan* v. *Little Hunting Park,* 396 U.S. 229, 236 (1969). This disposes of the argument that these were "truly private" schools since the opportunity to attend these schools was open to every white child. *Tillman,* at 4313 and 4314. It is difficult to accept the defendants' argument that the plaintiffs may not have been qualified to meet their schools' high standards. This answer is certainly unavailing with regard to the day camp or nursery and is suspect insofar as the first grade is concerned since Colin Gonzales, be-

[3] The analogy to all black academies, all Chinese schools, and all rabbinical schools is inapposite. These institutions don't fall within the proscription of § 1981. Whatever else may be said of their policies, those institutions are free to discriminate against whites, or against other non-whites if whites are similarly discriminated against, without running afoul of § 1981.

cause of his race, was never given the opportunity to demonstrate that he was qualified.[4]

Intervenor proffered testimony which would establish:

1. That intervenor parents act rationally in holding a belief that segregation is desirable in education in light of the performance record of these schools and current scientific theory; and

2. That the intervenor schools are academically successful beyond the national public school average and have low disciplinary problems, both of which are causally related to segregated policies.

The Court finds this testimony to be irrelevant to the issue in these actions, feeling that such testimony, as a defense to outlawed policies of segregation, embodies a concept rejected in *Brown* v. *Board of Education, supra.*

Intervenor has seized on certain dicta of the Supreme Court in *Norwood* v. *Harrison*, 41 U.S.L.W. 5094 (June 25, 1973), which states that "private bias" is not proscribed by the Constitution and that "private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment. . . ." Comforting as these words may be to the defendants out of context, it must be pointed out that § 1981 was not there involved; that *Jones* v. *Mayer Co.* was cited to the contrary as an example of private discrimination made unlawful by Congress; and that the opinion specifically points out that "[t]his case does not raise any question as to the right of citizens to maintain private schools with admission limited to students of particular national origins, race or religion. . . ." *Norwood* v. *Harrison*, at 5095. Moreover, although perhaps not legally significant, as a practical consideration, it is inconceivable that the opinion in the case would have attained the indicated degree of unanimity if it stood for the proposition urged by the intervenor. Accordingly the Court feels *Norwood* is not authority for that proposition.

[4] The defendant Fairfax-Brewster points to page 2 of its handbook (Def's Ex. 2) to indicate that Colin Gonzales should have submitted a report card and other pertinent records from his previous school, the omission of which was a ground for his rejection. The same page of the handbook provides for Entrance Examination if previous scholastic records are inadequate. Colin was denied the opportunity to take this examination since he was never told that his scholastic record inadequacy was the reason for his rejection.

While no relief is sought under 42 U.S.C. § 2000a et seq., it seems appropriate to point out that, in the Court's view, this act is not a limitation on § 1981, and consequently the exemption of 42 U.S.C. § 2000a(e) for private establishments does not apply in this case. Moreover, as indicated before, *Sullivan* v. *Little Hunting Park* has abolished traditional notions of what is "private" insofar as these types of actions are concerned.

Plaintiffs are accordingly entitled to the relief requested, namely:

A. An adjudication that the policies with respect to the admission of students to defendants' day camp and school, of discriminating on the basis of race or color, are a violation of 42 U.S.C. § 1981.

B. A permanent injunction against the defendants and intervenor, their agents and those acting in concert with them, prohibiting them from following the policies described in Paragraph A.

C. An award of compensatory [5] damages for the embarrassment, humiliation and mental anguish which the Court finds to have been suffered by the plaintiffs as follows:

1. In favor of Colin Gonzales:	
(a) Against Fairfax-Brewster School	$2,000
(b) Against Bobbe's School	500
2. In favor of Michael McCrary against Bobbe's School	1,000
3. In favor of Sandra McCrary and Curtis L. McCrary against Bobbe's School	2,000

D. An award of attorney's fees as follows:

1. Against Fairfax-Brewster School	$1,000
2. Against Bobbe's School	1,000

E. Their costs.

And it is so ordered.

/s/ A. V. B.
United States District Judge

Alexandria, Virginia
July 27, 1973

---

[5] Punitive damages are not awarded. While the defendants' acts have here been declared improper, insofar as the Court can determine similar acts have not heretofore been so declared. Accordingly the defendants cannot be said to have acted recklessly or wilfully in disregard of clear existing law.

EXHIBIT C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 73-2348

MICHAEL C. MCCRARY, INFANT BY CURTIS L. MCCRARY AND SANDRA MCCRARY AND COLIN M. GONZALES, INFANT BY RAYMOND GONZALES AND MARGARET R. GONZALES,
Appellees,

v.

RUSSELL L. RUNYON, KATHERYNE E. RUNYON,
Defendants,

SOUTHERN INDEPENDENT SCHOOL ASSOCIATION,
Appellant.

No. 73-2349

MICHAEL C. MCCRARY, INFANT BY CURTIS L. MCCRARY AND SANDRA MCCRARY AND COLIN M. GONZALES, INFANT BY RAYMOND GONZALES AND MARGARET R. GONZALES,
Appellees,

v.

RUSSELL L. RUNYON, KATHERYNE E. RUNYON,
Appellants.

SOUTHERN INDEPENDENT SCHOOL ASSOCIATION,
Defendant.

No. 73-2350

MICHAEL C. MCCRARY, INFANT BY CURTIS L. MCCRARY AND SANDRA MCCRARY,
Plaintiffs,

COLIN M. GONZALES, INFANT BY RAYMOND GONZALES AND MARGARET R. GONZALES,
Appellants,

v.

RUSSELL L. RUNYON, KATHERYNE E. RUNYON
SOUTHERN INDEPENDENT SCHOOL ASSOCIATION,
Appellees.

No. 73-2351

COLIN M. GONZALES, INFANT BY HIS PARENTS, RAYMOND GONZALES AND MARGARET R. GONZALES,

Appellees,

v.

FAIRFAX-BREWSTER SCHOOL, INC.,

Appellant

No. 73-2352

COLIN M. GONZALES, INFANT BY HIS PARENTS, RAYMOND GONZALES AND MARGARET R. GONZALES,

Appellants,

v.

FAIRFAX-BREWSTER SCHOOL, INC.,

Appellee.

Argued April 2, 1974

Decided April 15, 1975

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge.

Before Haynsworth, Chief Judge ,and Winter, Craven, Butzner Russell, Field and Widener, Circuit Judges, sitting en banc.

George S. Leonard and Louis Koutoulakos for Appellants in Nos. 73-2348, 73-2349 and 73-2350; Andrew A. Lipscomb (Gary R. Sheehan and Tolbert, Lewis and Fitzgerald on brief) for Appellants/cross-Appellees in Nos. 73-2351 and 73-2352; (Thomas J. Schwab on brief for

Amici Curiae in Nos. 73-2348, 73-2349 and 73-2351; Allison W. Brown, Jr., (Robert M. Alexander and Roderick V. O. Boggs on brief) for Appellees/cross-Appellants in Nos. 73-2348, 73-2349, 73-2350, 73-2351 and 73-2352.

HAYNSWORTH, *Chief Judge:*

The issue in this case is whether 42 U.S.C.A. § 1981 [1] prohibits private schools from denying admission to qualified black applicants solely on the basis of their race.

This appeal is a consolidation of two suits initiated by parents of black children who claim that they were denied admission to the appellant schools because of their race.

The Southern Independent School Association intervened in these actions, alleging that it is an association representing over 300 private, non-profit schools in the South, some of which concededly are racially exclusive in their admission policies. The position of the intervenor is simply that racial discrimination by private schools is not prohibited by § 1981, and, in any event, cannot be constitutionally prohibited.

I.

As found by the trial judge, in early May 1969, the parents of Colin Gonzales contacted the Fairfax-Brewster School, a private school located in Fairfax County, Virginia, about enrolling their son in the school's summer day camp prgoram, and continuing into the first grade in the fall. The Gonzales' learned of Fairfax-Brewster through

---

[1] "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

a mass mailing addressed to "President," an advertisement in the Yellow Pages in the telephone book, and from a friend whose son attended the Summer Camp.

Thereafter, the Gonzales visited the school and, being pleased with what they saw, completed an application for their son. They also furnished, as required, a medical certificate and application fee. On May 16, 1969, the medical certificate and application fee were returned, accompanied by a form letter stating that the school was "unable to accommodate the application." No further explanation was given.

Mr. Gonzales called the school and spoke with someone who identified himself as Captain Reiss. In response to Mr. Gonzales' inquiry as to why his son's application was rejected, he was told that the school was not integrated.

Captain Reiss is the Chairman of the Board of Fairfax-Brewster School. His son, Robert, is the Administrative Director, and his daughter-in-law Olga is the Registrar.

Both Captain Reiss and his son deny any such conversation. They testified that Colin, age 5½, was rejected because they felt that the kindergarten he had previously attended gave Colin insufficient preparation for the first grade at Fairfax-Brewster. Because they found Colin unqualified for the first grade, the Reisses concluded that "there was no point" in allowing him to enter the summer camp only to have to "yank him out" at the beginning of the academic year.

Subsequent to their son's rejection from Fairfax-Brewster, the Gonzales telephoned Bobbe's School, and were told that only members of the Caucasian race were accepted.

In August 1972, Mrs. McCrary called Bobbe's School about enrolling her two year old son, Michael, in the nursery school. She asked whether the school was integrated and accepted blacks, and was told it did not. She did not file a formal application with Bobbe's.

Mr. Gates, the superintendent of Bobbe's, testified that he never received a call from either the Gonzales or Mrs. McCrary. He testified that the school does not discriminate on the basis of race, although he said that no black child had ever applied.

The district court found the testimony of the Reiss "unbelievable," and concluded that Colin had been rejected from Fairfax-Brewster because of his race. He further found that both the Gonzales and Mrs. McCrary had called Bobbe's and had been told that the school would not accept blacks. It held that "[i]t is of no moment that no formal application was filed. It would be ridiculous to require this of the plaintiffs after they had effectively been told it was useless."

Accordingly, the court concluded that the appellant schools practiced racial discrimination in their admissions policies.

On the authority of *Jones* v. *Alfred H. Mayer Co.* 392 U.S. 409 (1968), *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969) and *Tillman* v. *Wheaton-Haven Recreation Assn.*, 410 U.S. 431 (1973), it held that § 1981 prohibits racial discrimination in private contractual arrangements, even when there is no state involvement. Therefore, it held that the schools were in violation of § 1981 in their admissions policies, and permanently enjoined defendants and intervenors from discriminating against blacks in enrollment in their schools. In addition, it awarded damages for embarrassment, humiliation and mental anguish to Colin, Michael and Michael's parents, and attorney's fees against Fairfax-Brewster and Bobbe's. *Gonzales* v. *Fairfax-Brewster School, Inc.*, 363 F. Supp. 1200 (E.D. Va. 1973).

Defendants and intervenor appeal. We affirm the injunction and the award of damages, but reverse the award of attorney's fees.

II.

Initially, the appellants contest the district court's findings of facts, urging that the district court was clearly erroneous in concluding that Fairfax-Brewster and Bobbe's practice racial discrimination.

There was conflicting testimony as to whether the Gonzales had been told that Fairfax-Brewster was not integrated and whether both the McCrarys and Gonzales were told that Bobbe's was not integrated. Resolution of this conflict depended upon the district court's evaluation of the credibility of the witnesses. We may not reverse a trier of fact, who had the advantage of hearing the testimony, on a question of credibility.

In addition, the testimony of the black parents was corrobrated and supported by the testimony of two other witnesses. Mrs. Bryant testified that she had telephoned Fairfax-Brewster and Bobbe's to inquire about their admissions policies and was told that the schools were not integrated. Mr. Brooks, Mrs. McCrary's supervisor at her job, testified that a Mr. Gates, at Bobbe's told him, over the telephone, that Bobbe's did not accept blacks.

The trial judge also thought that the Reiss's story that Colin was rejected on educational rather than racial grounds was undercut by the fact that Fairfax-Brewster allows applicants to take an entrance examination when previous scholastic preparation is inadequate. Colin was not given this opportunity.

In short, there is ample evidence in the record to support the trial judge's factual determinations, and we are unable to say that, viewing the record as a whole, he was clearly erroneous in concluding that Colin and Michael were denied admission to the schools because of their race.

III.

The substantial legal questions, which have been the subject of varied comment in the literature,[2] we think were correctly resolved by the district court. Section 1981 is a limitation upon private discrimination, and its enforcement in the context of this case is not a deprivation of any right of free association or of privacy of the defendants, of the intervenor, or of their pupils or patrons.

A.

It may once have been supposed that § 1981 served only the limited office of removing legal disabilities which state statutes imposed upon black people. It, of course, did cancel state statutes which imposed restrictions upon the right of blacks to contract, but the Supreme Court has clearly held that it did much more than that. *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229; *Tillman* v. *Wheaton-Haven Recreational Assn.*, 410 U.S. 431 (1973).

In *Jones* v. *Mayer*, the Court was concerned with the right to purchase real estate. There a real estate developer had refused to sell a residence in a "white area" to the black plaintiff. Analyzing the text and legislative history of § 1 of the Civil Rights Act of 1866,[3] the Court held

---

[2] *See*, Note, Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments, 74 Colum. L. Rev. 449 (1974); Note, Desegregation of Private Schools: Section 1981 as an Alternative to State Action, 62 Geo. L. J. 1363 (1974); Note, Segregation Academies and State Action, 82 Yale L.J. 1436 (1973); Comment, Jones v. Alfred H. Mayer Co. Extended to Private Education: Gonzales v. Fairfax-Brewster School, Inc., 122 U. Pa. L. Rev. 471 (1973); Recent Decisions, 45 Miss. L.J. 246 (1974); Recent Decisions, 8 U. Rich. L. Rev. 285 (1974); Recent Cases, 42 U. Cin. L. Rev. 767 (1973); Recent Cases, 26 Vand. L. Rev. 1307 (1973).

[3] 14 Stat. 27.

that § 1982 applied to purely private activity and provided a judicial remedy. As so construed, it was held that enactment of § 1982 was a valid exercise of the power of Congress under the enforcement clause of the Thirteenth Amendment, which gave Congress power to "pass all laws necessary and proper for abolishing all badges and incidents of slavery."[4] The Court concluded that, unlike the Fourteenth Amendment, the Thirteenth reached private conduct in which no state action was involved.

As an intellectual exercise, the historical reading and interpretation of the majority in *Jones* v. *Mayer* may be debatable. *See* VI History of the Supreme Court of the United States; Fairman—Reconstruction and Reunion, 1207 et seq. That reading and interpretation was followed in *Sullivan* v. *Little Hunting Park* and in *Tillman* v. *Wheaton-Haven,* however, and, for us, is firmly established.

Jones v. *Mayer,* of course, dealt with § 1982, assuring the right to purchase property. We deal with § 1981, assuring the right to contract, but both sections derive from § 1 of the Civil Rights Act of 1866. Both are subject to the same analysis and must be interpreted in the same light. In *Tillman* v. *Wheaton-Haven,* the claim of the guest and the host rested upon § 1981. The Supreme Court expressly noticed the relation between § 1981 and § 1982, their common derivation from § 1 of the Civil Rights Act of 1866 and the necessity of according them similar interpretation.

It is contended here, however, that § 1981 confers no right of action unless the contract denied the aggrieved person was open to all white people. It seems obvious that the relationship between the school on the one hand and a pupil and his parent on the other hand is a contractual one and that admission is a part of the process of forming such a contractual arrangement. It is also true that admission to the school is not open to all white people because there are

[4] Civil Rights Cases, 109 U.S. 3, 20 (1883).

academic, financial and other restrictions upon admission. Within the qualified class, however, there is no other limitation upon the admission of white applicants up to the school's capacity.

We may not read § 1981 so restrictively as the schools would have us to do it. The school may not refuse with impunity to accept an otherwise qualified black applicant simply because it declines to admit unqualified white applicants. The section is violated by the school as long as the basis of exclusion is racial, for it is then clear that the black applicant is denied a contractual right which would have been granted to him if he had been white.

What we have said should not be read to call into question the right of the school to insist upon an evenhanded requirement of academic and other racially neutral qualifications. Indeed, the right of the school to be selective on those basis is unquestioned here. All that is contended and all that we hold is that § 1981 prohibits the rejection of a black applicant when his qualifications meet all other requirements and race is the only basis for his rejection.

B.

As applied here, we see no violation of any constitutionally protected rights of free association and of privacy.

There is a protected right of free association. As stated by the Supreme Court in *NAACP* v. *Alabama,* 357 U.S. 449 (1958), "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of * * * freedom of speech." *Id.* at 460. The constitutional protection, however, is essentially an attribute of First Amendment rights and would not ordinarily justify exclusion of others sharing the same beliefs and ideas. Here, at least, there is no showing that discontinuance of their discriminatory admission practices would inhibit in any way the teaching in these schools of any ideas or dogma.

Nothing in § 1981 impedes parents in their exercise of a choice of a private school presenting ideas or having educational methods or practices which are not available in the public schools. They may do the same thing to avoid ideas and influences in the public schools which they regard as unhealthy. See *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925). Among private schools, they are free to prefer one with a certain curriculum or dogma over others, but the school, while it may exclude applicants on the basis of neutral principles, may not exclude on the basis of race.

There is also a right of privacy. Its constitutional basis may be elusive, but it has clearly been held to exist. *Roe* v. *Wade*, 410 U.S. 113 (1973); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965).

Though certain intimate and private affairs of men and women are protected from governmental interference, the schoolhouse is far from the realm of protection. The right is appropriately recognized in certain instances when only a few people are involved in activity unintended for the public view. In such instances, it is more than likely or inevitable that there is some plan or purpose of exclusiveness other than race. When relations between husband and wife are involved, their purpose to exclude all the rest of the world has no racial connotations. When a school holds itself open to the public, however, or even to those applicants meeting established qualifications, there is no perceived privacy of the sort that has been given constitutional protection.

Indeed, § 1981 does not purport to reach all private associations. It reaches only those which evidence "no plan or purpose of exclusiveness" other than race. *Sullivan* v. *Little Hunting Park*, supra. Private associations having non-racial criteria for the selection of members may apply their criteria, even if it results in a disproportionate impact upon the members of one race. It is only when blacks are excluded because they are black, or denied a

right to contract which would be granted were they white, that § 1981 is violated.

Nor do we read anything in *Norwood* v. *Harrison*, 413 U.S. 455 (1973), as holding that rights of association or rights of privacy, or both combined, prevent the application of § 1981 here. In *Norwood* the Supreme Court struck down a Mississippi statute giving free textbooks to all students, including those attending private, segregated schools. Mississippi contended that its failure to furnish free textbooks to students in private, segregated schools would violate the equal protection clause and would undermine the right of the parents to send their children to private schools. In answer, the Court observed that because "the Constitution may compel tolerance of private discrimination in some circumstances does not mean that it requires state support for such discrimination." "413 U.S. at 463.

The observation in *Norwood* is far from a holding that segregation in a private school is constitutionally protected. Earlier in the opinion the Court had observed that no such question was presented. 413 U.S. at 457. Nor are we met with the question whether segregation in private schools is itself a violation of the Thirteenth or Fourteenth Amendment. We deal with a specific statute passed in implementation of the Thirteenth Amendment. *See Katzenbach* v. *Morgan*, 384 U.S. 641 (1966); Note, Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments, 74 Colum. L. Rev. 449 (1974).

Finally, the Court in *Norwood* recognized the thrust of § 1981 and § 1982 when it noted that private discrimination "has never been accorded affirmative constitutional protections. And even some private discrimination is subject to special remedial legislation in certain circumstances under § 2 of the Thirteenth Amendment." 413 U.S. at 470. We deal with such circumstances. In short, we cannot read *Norwood* as a holding that segregation in private

schools such as these is constitutionally protected so as to be beyond the reach of § 1981.

C.

Some schools may be so private as to have a discernible rule of exclusivity which is inoffensive to § 1981. Should siblings combine to employ tutors for their children ,they may exclude the rest of the world, for the rule of exclusivity bars the more distantly related and the unrelated regardless of race. The schools here are not private in that sense, and there is no discernible neutral rule of exclusivity which would bar these plaintiffs. The schools are private only in the sense that they are managed by private persons and they are not direct recipients of public funds. Their actual and potential constituency, however, is more public than private. They appeal to the parents of all children in the area who can meet their academic and other admission requirements. This is clearly demonstrated in this case by the public advertisements. Within that constituency, they may not exclude a black applicant, solely because of his race, while accepting white applicants with comparable qualification.

IV

The district court awarded damages for embarrassment, humiliation and mental anguish suffered plus an award of attorney's fees. The schools complain of both.

A.

It is not helpful to state decisions in personal injury tort cases in which damages for such injuries are denied.[8]

[8] After the recent decision of the Virginia Supreme Court in *Womack* v. *Eldridge*, 43 U.S.L.W. 2267 (Va. December 2, 1974), it is arguable that the plaintiffs here could recover damages in a state tort action for emotional distress. For an earlier discussion of Virginia's requirement of a resulting physical injury in distress cases, see *Hughes* v. *Moore*, 214 Va. 27, 197 S.E.2d 214 (1973).

That damages are recoverable for violations of §§ 1981 and 1982 is established by *Sullivan* v. *Little Hunting Park*, 396 U.S. 229, 240, in which we are told "both federal and state rules on damages may be utilized, whichever better serves the policies expressed in the federal statutes."

Section 1981 doubtless was intended to give to the former slaves access to opportunities for material betterment of themselves, but it was also intended to remove the stigma which accompanied the disabilities under which they formerly had labored. The plain command of the statutes is that those formerly enslaved henceforth shall be treated as having all of the rights and dignity of other people dwelling with them in a land of freedom. A denial of those statutory rights is treatment of the victim as being subject to those earlier disabilities. It is an affront, of which embarrassment and humiliation are natural consequences. If the statute is to be enforced fairly, if injuries suffered directly because of its violation are to be fairly compensated, damages for embarrassment and humiliation must be recoverable in a case such as this.

B.

The award of attorney's fees stands in a different posture. It is one thing to award damages for the invasion of a legal right and quite another to impose all of the litigation costs on the defendant. Unlike damages, attorney's fees have been granted only in narrowly defined circumstances.

We have recognized the propriety of an award of fees when a party maintained his position in bad faith, displaying "obstinate obduracy." *Brewer* v. *School Board of City of Norfolk*, 4 Cir., 456 F.2d 943, 948-52. The district court, however, made no finding of "obstinate obduracy."[9]

[9] In refusing punitive damages, the district court found that the defendants had not "acted recklessly or wilfully in disregard of clear existing law." 363 F. Supp. at 1255 n.3.

and we can see no basis for such a finding. Since this suit involves a novel application of a recently revived statute, the litigation of the issues cannot be equated with the recalcitrance we found in *Brewer*. Although at trial the parties recounted different versions of the facts and the court accepted the plaintiffs' story, the finding suggests no bad faith or perjury. Faults in perception or memory often account for differing trial testimony, but that has not yet been thought a sufficient ground to shift the expense of litigation.

Attorney's fees, of course, are available where Congress has expressly authorized them. A conspicuous example is Title II of the 1964 Civil Rights Act.[7] *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968). Section 1981 never contained a provision for fees, and although the Emergency School Aid Act of 1972 expressly allows fees in suits to desegregate public or federally aided secondary or elementary schools,[8] plaintiffs have made no showing of federal aid to, or state action by, the defendants.

In the absence of expressed congressional direction, we are presented with the question whether to adopt a "private attorney general" theory. Although application of that theory may be proper in some actions based on the 1866 and 1870 Civil Rights Act, it would be inappropriate in this case. In considering an award of fees in an action based on the older civil rights statutes, we look to more recent congressional determinations that a policy is so

[7] 42 U.S.C. § 2000a-3(b).

[8] 20 U.S.C. § 1617 (allowing fees against a "local educational agency, a State . . . or the United States" for a violation of that Act, Title VI of the 1964 Civil Rights Act or the Fourteenth Amendment). *See* Bradley v. School Board of the City of Richmond, 416 U.S. 696 (1974); Northcross v. Board of Education of the Memphis City Schools, 412 U.S. 427 (1973).

important or public enforcement mechanisms are so ineffective that attorney's fees are necessary to promote private enforcement. Mere provision of a private cause of action is not sufficient. A statutory grant of attorney's fees in suits covering the same subject matter, however, would be a strong indication of such a congressional determination.

In *Lee* v. *Southern Home Sites Corp.*, 5 Cir., 444 F. 2d 143, Judge Wisdom looked to the enactment of the Fair Housing Law of 1968, which contained a fees section, 42 U.S.C. § 3612(c), in deciding that fees were available to a plaintiff seeking to redress racial discrimination in the sale of houses under § 1982. In 1968 Congress had acted, pursuant to its powers under the Thirteenth Amendment,[9] to prohibit discrimination in the sale of private housing.[10] In Lee's § 1982 action, he proceeded against precisely the discrimination that Congress had sought to curb by providing for an award of reasonable fees for his attorney to a prevailing plaintiff in a private enforcement action.

Employment discrimination suits provide another example of judicial allowance of fees under the older, more general civil rights statutes. We have recognized that a plaintiff under Title VII might recover attorney fee.[11] Reaching beyond Title VII, courts have allowed fees in actions brought under the older civil rights statutes to eliminate similar employment discrimination. *Fowler* v. *Schwarzwalder*, 8 Cir., 498 F.2d 143, (1[1] 1981, 1983); *Harper* v. *Mayor and City Council of Baltimore*, D. Md. 359 F. Supp. 1197, 1218-19, *modified on other grounds sub nom.*,

[9] United States v. Hunter, 4 Cir., 459 F.2d 205, 214.

[10] After December 31, 1968 the Act applied to all dwellings, 42 U.S.C. § 3603 (a)(2), except those enumerated in § 3603(b). In *Lee* it was not clear whether the Act applied since the transactions occurred before December 31, 1968, and evidence on the applicability of § 3603 (a)(1), which covered that period, was not recounted in the opinion.

[11] 42 U.S.C. § 2000e-5(k); Lea v. Cone Mills Corp., 4 Cir., 438 F.2d 86; Robinson v. Lorillard Corp., 4 Cir., 444 F.2d 791.

Harper v. *Kloster*, 4 Cir., 486 F.2d 1134 (§§ 1981, 1983); *Cooper* v. *Allen*, 5 Cir., 467 F.2d 836 (§ 1981). In *Cooper* the plaintiff based his suit on racial discrimination in hiring by a municipal golf course, but he failed to go through the conciliation procedures of Title VII and could not proceed under the statute. Nevertheless, Congress had authorized fees in the similar Title VII action to encourage private elimination of such discrimination. Where plaintiffs advance precisely the same congressional goal by the use of a more general statute, they may be entitled to attorney's fees. That is not to say, however, that once fees are awarded in any § 1981 or § 1982 case, they should always be granted in actions based on those statutes. The focus of the inquiry should be whether the plaintiffs advanced a goal the attainment of which Congress sought to further by providing for the recovery by a prevailing plaintiff of his attorney's fees.

In this case the plaintiffs have not acted to foster a goal that Congress deemed so urgent. The Emergency School Aid Act spoke only to desegregation actions against public and federally aided schools. Unlike the Federal Housing Law or Titles II and VII of the 1964 Civil Rights Act, the statute does not aim to eliminate discrimination from a facet of private American life. The limitation in that statute to public schools is not merely a technical or procedural restriction, but goes rather to the substance of the congressional goal. Without some congressional direction, even by analogy, we will not award attorney's fees, but will adhere to the usual rule that prevailing plaintiffs may not recover attorney's fees,[12] for we find none of the recognized exceptions applicable.[13]

AFFIRMED IN PART.

REVERSED IN PART.

---

[12] Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717 (1967).

[13] See Hall v. Cole, 412 U.S. 1 (1973); Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970).

BUTZNER, *Circuit Judge*, concurring in part and dissenting in part:

I concur in Parts I, II, III, and IV-A of the opinion. I dissent from Part IV-B which reverses the district court's allowance of attorney's fees. I would adhere to our practice of sustaining a district judge who, for reasons, has allowed attorneys' fees. His discretion can be justified in this case on two grounds: the appellees acted as private attorneys general, and, alternatively, the appellants' defense was tainted by obdurate obstinacy.

By prosecuting this single case, the appellees invalidated the racially exclusive admission practices of over three hundred schools represented by the Southern Independent School Association, as well as the practices of Fairfax-Brewster and Bobbe Schools. In so doing, they vindicated congressional policy by abolishing an aspect of racial discrimination prohibited by the Civil Rights Act of 1866 [42 U.S.C. § 1981]. This type of suit is encompassed by the private attorney general doctrine, which is applicable to suits brought under the Civil Rights Acts of 1866, 1871, and 1964. *See, e.g.*, Newman v. Piggie Park Enterprises, Inc., 390 U. S. 400 (1968); Cooper v. Allen, 467 F.2d 836 (5th Cir. 1972); Lee v. Southern Home Sites Corp., 444 F.2d 143 (5th Cir. 1971); Sims v. Amos, 340 F. Supp. 691 (M.D. Ala., 3-judge court), *aff'd mem.*, 409 U.S. 942 (1972). Under this doctrine, the award is not dependent on proof of bad faith, for good or bad faith is irrelevant. Brandenburger v. Thompson, 494 F.2d 885, 888 (9th Cir. 1974). Nor does the receipt of compensatory damages preclude an award of attorneys' fees, Knight v. Auciello, 453 F.2d 852 (1st Cir. 1972), though, of course, a court may take damages into account when awarding a fee. *See* Lee v. Southern Home Sites Corp., 444 F.2d at 147.

Alternatively, attorneys' fees are justified when defendants display obdurate obstinacy. *See* Brewer v. School Board of City of Norfolk, 456 F.2d 943 (4th Cir.

1972) (dictum). The district court's findings, amply supported by the record, demonstrate that the officers of the schools did not truthfully recount under oath the facts of the case. Such bad faith in the conduct of litigation is a pernicious form of obstinacy that can no more be tolerated than out-of-court bad faith. *Cf.* Hall v. Cole, 412 U.S. 1, 15 (1973). This behavior should not be excused simply because this case involves a novel factual situation. *Cf.* Lea v. Cone Mills Corp., 438 F.2d 86, 88 (4th Cir. 1971); Miller v. Amusement Enterprises, Inc., 426 F.2d 534, 536 (5th Cir. 1970).

Finally, I believe that the enactment of 20 U.S.C. § 1617 directing the allowance of fees in public school desegregation cases does not create an inference that Congress intended to withdraw from district courts "the inherent equitable power"* of a chancellor to allow fees in actions against private schools when the facts otherwise justify the award because the plaintiffs acted as private attorneys general or the defendants displayed obdurate obstinacy. Other courts confronted with analogous problems have not restricted the allowance of fees in suits brought under the earlier Civil Rights Acts to instances where Congress has subsequently authorized fees in related legislation. *See, e.g.*, Brandenburger v. Thompson, 494 F.2d 885 (9th Cir. 1974) (welfare benefits); Sims v. Amos, 340 F. Supp. 691 (M.D. Ala., three-judge court), *aff'd mem.* 409 U.S. 942 (1972) (reapportionment). Indeed, the drastic limitation on the allowance of fees in civil rights cases suggested by the majority appears to be without precedent.

Judge Winter and Judge Craven concur in Parts I, II, III, and IV-A of the court's opinion. They join Judge Butzner in dissenting from Part IV-B.

---

* *See* Hall v. Cole, 412 U.S. 1, 5 (1973).

RUSSELL, FIELD, and WIDENER, *Circuit Judges*, concurring and dissenting:

I

We concur in the result reached in part IV-B of the opinion of the court. We would not, of course, reach the question of attorney's fees if our view on the merits prevailed. Otherwise, we respectfully dissent.

II

In its opening paragraph, the majority opinion correctly states the legal issue[1] in this case. We add, however, that the issue is presented to this court as one of first instance in any federal court at this or higher level.[2] We are bound by no definitive Supreme Court decision.

The majority regard *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968), followed in *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969), and *Tillman* v. *Wheaton-Haven Recreational Association*, 410 U.S. 431 (1973), as being controlling precedents. We do not so regard those decisions.

We believe that the majority has been unduly impressed by the historical relationship between §§ 1981 and 1982

---

[1] We are not convinced that the district court's findings of fact are not clearly erroneous. Such laments, however, being largely unavailing, see *United States* v. *Johnston*, 268 U.S. 220, 227 (1925), we address ourselves to the important legal issue here presented.

[2] In *Grier* v. *Specialized Skills, Inc.*, 326 F. Supp. 856 (W.D. N.C. 1971), the United States District Court for the Western District of North Carolina held the refusal of a barber school to admit black students constituted a violation of § 1981. On the other hand, in *Riley* v. *Adirondack Southern School for Girls*, 368 F. Supp. 392 (C.D. Fla. 1974), the court refused to apply § 1981 to a racially segregated independent school. The decision is based at least in part on factual determinations. See also *Segregation in Private Schools*, 122 U. of Penna. L. Rev. 471, at 475 (1973).

and has failed to discern the difference between the right to purchase real estate and the right to attend an independent school inferred from the right to "make and enforce contracts." The purchase of real estate, with its attending perquisites, is a commercial transaction pure and simple, and many other contracts are likewise purely commercial. On the other hand, the relationship of teacher and student is one of status, which is related to the contract concept in the same way that the status of husband and wife may be said to grow out of contract of marriage. The contract aspect of the situation is minor and incidental and serves no purpose other than as a door opener in the present case to bring independent schools within the scope of § 1981. The right to make and enforce contracts does not imply a right to coerce an unwilling co-contractor into making any and every variety of contract.

The majority opinion also fails to recognize *Moose Lodge* v. *Irvis*, 407 U.S. 163 (1972), and *Gilmore* v. *City of Montgomery*, 417 U.S. 556 (1974). True, those cases do not involve § 1981 or § 1982, but involve the problem of State action under the Fourteenth Amendment. However, they do show that answers to apparently the same type of technical questions in this field may vary according to the facts of each particular situation.

Legal problems arising out of a purpose to readjust interracial relationships fall into four categories: (1) those arising under the Fourteenth Amendment; (2) those created by the Civil Rights Acts of the 1960's (3) those resulting from conditions imposed by the federal government upon benefits bestowed such as aids to education; and (4) those arising from the resurrection of the post Civil War Civil Rights Act of 1866 and the several acts of the 1870's, now found in 42 USCA §§ 1981, et seq. Legal problems involving the issues regarding the newly enfranchised slaves were acute until the *Civil Rights Cases*, 109

U.S. 3 (1883). Thereafter, such legal problems became stereotyped until the landmark decision in 1954 of *Brown* v. *Board of Education*, 347 U.S. 294 (1954). That case introduced the first of the above four categories, which is still paramount. Racially discriminatory action may be struck down under the Fourteenth Amendment provided State action is involved. In the 1960's, the Congress forbade racially discriminatory practices under the Civil Rights Acts of 1964 and 1968. Those acts did not touch private action in some fields. To cover this hiatus, the post Civil War Civil Rights Acts were resurrected. The leading case is *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968), which was decided after the passage of the Civil Rights Act of 1964.

After the Thirteenth Amendment abolished slavery in 1865, various States passed Black Codes designed to keep those who were newly enfranchised as second class citizens if citizens at all. Although such former slaves were now free, the objective was to keep them from exercising the legal rights usually associated with free citizenship such as the ownership of property and the making of contracts. See *Private Discrimination*, 74 Col. L.Rev. 450, 452 (1974). To counteract this movement, the Fourteenth and Fifteenth Amendments were eventually adopted. More immediately, however, the Civil Rights act of 1866 was passed. It was based upon § 2, the enforcement section, of the Thirteenth Amendment which, unlike the Fourteenth Amendment, did not require State action. What is now 42 USCA §§ 1981 and 1982 were section one of the Act of 1866. And there were misgivings as to the constitutionality of the Act. Simply, they were that the Thirteenth Amendment abolished slavery, and conduct, such as that prohibited by the 1866 Civil Rights Act, did not constitute the reestablishment of slavery in the strictest sense of the word. Because of the constitutional doubt just mentioned, the provisions of the Civil Rights Act of 1866 were reenacted, practically intact, in various statutes passed during the

1870's, after the effective date of the Fourteenth Amendment. Section One of the Act of 1866 was reenacted in 1870 and is now represented by 42 USCA §§ 1981 and 1982. Only the 1866, and not the 1870, Act is here pertinent because State action is clearly not involved in our case. The Acts of 1866 and 1870 were dormant for so many years that in civil law countries a desuetude would have occurred.[3] Not until after the passage of the Civil Rights Act of 1964 was the 1866 Act reactivated. The 1964 Act made no attempt to prevent racial discrimination in the admission policies of independent schools. If the Thirteenth Amendment authorized Congress to forbid independent schools to use race as an admissions criterion in 1866, it likewise did so in 1964. Whatever the intent of the 1866 Congress may have been, it must be that the 1964 Congress did not intend to restrict the admissions policies of independent schools.

The application of 42 USCA § 1981 to this case may be approached either as a matter of interpretation or as a matter of constitutionality: i.e., (1) what does § 1981 forbid? (2) is § 1981 constitutionally valid? Here, those two questions merge together. Section 1981, as any other statute, should be construed, in the light of constitutional limitations, to uphold its validity. See *Graham* v. *Richardson*, 403 U.S. 365, 382 (1971).[4]

---

[3] Our dissent is not bottomed on this premise. See *Jones*, p. 437.

[4] Our result would be the same whether we construe § 1981 as being in conflict with the constitutional right of free association, or construe it consistent therewith. Of course a statute falls if in conflict with the Constitution. *The Federalists*, Nos. 16, 78, Hamilton; No. 44, Madison. In this connection, footnote 3 of the district court's opinion is curious (363 F.Supp. 1200 at 1204). That note states that although § 1981 forbids discrimination by whites against non-whites, it does not forbid discrimination by non-whites against whites or other non-whites. Such a construction would make the section clearly unconstitutional. Simply put, the opinion of the district court is that all races, so far as § 1981 is concerned, may operate racially segregated schools except the white race. Either all may do so (as we contend), or none may. Such a restrictive construction of § 1981 also goes against the plain language of the statute. The section provides: "*All* persons . . . shall have the *same* right . . . to make and enforce contracts . . . as is enjoyed by white citizens, and shall be *subject to like* [disabilities of various kinds] . . ." (emphasis added). To give non-whites greater rights than whites would run contra to the statute, the same as giving them less rights would violate it.

While dissenting, we wish to make it clear that we do not necessarily express approval of the alleged restrictive admissions policies of the appellants. What is involved here is a collision between competing social interests, any of which, standing alone, would be regarded with favor.

On the one hand, our society has an interest in the upward mobility of all of its citizens, unhampered by invidious distinctions. A corollary of this is an interest in educational opportunities.

This interest in educational opportunity as a means of upward mobility is confronted by social interests in the true independence of private educational institutions, and in the right of voluntary association and non-association. Although the backbone of our educational system must of necessity be found in our public schools, in a diverse society such as ours the leavening value of educational institutions which are autonomous and free from control by the federal and state governments is generally and legally accepted. Compare *Pierce* v. *Society of Sisters*, 268 US 510 (1925). Society has an interest in preserving the true independence of such institutions.

The other social interest which supports the position of appellants is the interest in free association. It is conceded that, as a general matter, enforced association is

foreign to our institutions. Mr. Justice Douglas, in his dissenting [5] opinion in *Moose* p. 179, the proposition thus:

> "The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires."

Even were we to assume, for argument, the majority holding that the persuasiveness of the right of free association depends, in part at least, upon the size of the unit, both of the schools here involved are small. They are not huge and impersonal. The district court's opinion, 363 F.Supp. 1200, 1201, 1202, indicates a maximum enrollment at Fairfax-Brewster School of 236 and at Bobbe's School an average of 200. In schools of that size, intimacy of personal association is still important, and the right of free association certainly should apply, if it does in any case, to units of such numbers. How great a size, if any, might destroy the constitutional protection is a question not now before us.[6]

It is one of the missions of law to balance conflicting social interests so as to give the maximum of protection to

---

[5] The force of Mr. Justice Douglas' statement is not reduced by the fact that it was part of a dissenting opinion; in fact, it is accentuated. The issue in the case was whether the fact that a private club dispensed liquor by virtue of a State license made its action State action. The majority thought not; Mr. Justice Douglas thought so. Thus, the quoted language was opposed to the main thrust of the opinion.

[6] The numbers involved in *NAACP* v. *Alabama* and *Gilmore* would seem to indicate that great numbers alone do not necessarily furnish sufficient cause to lose the constitutional protection of freedom of association.

each.[7] Which interest will prevail will depend therefore upon special considerations in each context in which the conflict is presented. A good illustration of this point is to be found in a comment upon the district court's decision in the instant cases in *Segregation in Private Schools*, 122 U. Penna. L. Rev. 471, at 478, 479 (1973). It is there stated that "a balancing of Constitutional interests is necessary to produce a proper construction of section 1981." The author continues:

> "Our discussion to this point suggests where the balance might be struck without seriously impairing either right. The right to contract protected in section 1981 should be limited to contracts found in secondary, as contrasted with primary relationships. The former [sic, latter] are 'basically relationships between friends,' characterized by 'intimate association.' Secondary relationships, by contrast, are 'impersonal, highly formalized relations between people,' for example, the relationship between buyer and seller . . . under this approach, discrimination would be allowed in primary relationships for any reason whatever, including racial bias, . . ."

The article suggests that such a differentiation reconciles the results in *Jones* v. *Alfred H. Mayer Co.*, 392 US 409 (1968), and *Moose Lodge No. 107* v. *Irvis*, 407 US 163 (1972). If this approach is used, it seems to us that a secondary school as found here involves a primary relationship and thus is not within the scope of § 1981.

So far as the balancing of conflicting interests is concerned, the difference between the right to own property, under § 1982, and the alleged right to attend an independent school under § 1981 becomes apparent. The word "right"

---

[7] See Julius Stone, *Social Dimensions of Law and Justice* (Stanford University Press, 1966), Chapter 4, pages 164, et seq., citing Roscoe Pound and other legal scholars. Somewhat this same idea is suggested in 122 U. Penna. L.Rev. 471 at 478, 479 (1973), and 74 Col. L.Rev. 449, 468, 469 (1974).

is ambiguous. See *Private Discrimination*, 74 Col. L. Rev. 449, at 460, 469 (1974). It may mean an immunity from legal disability to own property or make a contract. In Hohfeldian terms, this would be a privilege. Or it may mean a power to compel another to convey property or enter into contractual relations notwithstanding a refusal to do so solely because of race. It is not necessary to assume that the word right means the same in all contexts. If on the one hand we consider society's interest in upward mobility and the removal of invidious discrimination against disadvantaged groups, it would seem clear, as pointed out in the Columbia Law Review citation, supra, that a mere freedom from legal disability to own property would be of little value to a black person if prospective vendors could refuse to sell to him because of his race. There might be no other source from which he could purchase property. Thus, the Supreme Court's decision in *Jones v. Alfred H. Mayer Co.*, 392 US 409 (1968), can be readily understood and accepted, even were we not under obligation to accept and follow it.

The same basis of necessity is not available to support the desire of blacks to attend an all white independent school. The overwhelming portion of the burden of educating our people is borne by public schools, which by law are non-segregated. If all schools, nursery through college, are considered, in 1972, 88.6% attended public schools and only 11.4% attended non-public schools. If only secondary schools, which is what are involved in this case, be considered, statistics show that in 1972 92.8% of students attended public schools and only 7.2% attended non-public schools. (American Almanac for 1974, page 338). These statistics are the more significant when it is considered that many independent schools, including all or practically all church affiliated institutions, do not use race as a basis for admission. Thus, as far as acceptance as a first class citizen is dependent upon educational opportunity, the impact of schools such as those operated by the two appel-

lants is diminutive. If it be asserted that the exclusionary policies of schools such as those appellants have invidious implications, it must be remembered that most, if not all, of the high prestige private schools, are not racially segregated. In fact, many of them make an affirmative effort to obtain black students. See *Segregated Academies and State Action* 82 Yale L. Jour. 1436, at 1444 (1973). Indeed, at the time of the district court's decision in this case, appellee Colin Gonzalez had been accepted by and was attending the Congressional School, a non-public school. 363 F. Supp. 1202. Insofar as society's interests in educational opportunity for all of its citizens and the removal of invidious discrimination are weighed against society's interests in true independence of non-public educational institutions and freedom of association, especially in connection with close, intimate relationships, we believe that, unlike the right to purchase property involved in *Jones v. Alfred H. Mayer Co.*, the balance is in favor of construing the right to make and enforce contracts protected by § 1981 as being a freedom from legal disability and not as being extended to prohibiting a non-public institution from operating on a racially segregated basis.

As we have previously indicated, we do not find it necessary to express an opinion on the constitutional validity of 42 USC § 1981, but we do feel compelled to say that the result reached by the majority is an unconstitutional and invalid application of the statute. Our conclusion is supported by the opinion of the court in *Gilmore v. City of Montgomery*, 417 US 556 (1974), which adopts, in the opinion of the court, the language we have previously quoted from the dissenting opinion of Mr. Justice Douglas in *Moose Lodge* to the effect that people may band together in their association with whomsoever they please. And those cases specifically refer to the forbidden and highly suspect classifications of race and religion. Nothing in history or the precedents contains any suggestion that the same reasoning applied to a religious school in *Pierce*, to

a social club in *Moose Lodge*, and indeed (albeit in slightly different context) to private schools in *Gilmore*, should not apply here. And we think the majority takes too little account of *Norwood v. Harrison*, for in that case, in a discussion of the precise type of segregated private school involved here, the court unequivocally stated that the very bias here charged is neither invalid nor subject to sanction of law:

> "Such private bias is not barred by the Constitution, nor does it invoke any sanction of law, but neither can it call on the Constitution for material aid from the State." 413 US 455, 469.

We would reverse the judgment of the district court on all points.